In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-287

GABLES BY THE SEA, INC., PETITIONER

v.

EMMETT C. LEE, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that the respondents improperly denied its application for a permit to dredge and fill lands beneath the navigable waters of the United States because (1) they failed *sua sponte* to hold a public hearing and (2) they based the denial on widespread opposition to the application as well as on adverse environmental effects.

On July 28, 1972, petitioner submitted an application to the Corps of Engineers for an extension and modification of a dredging and filling permit, which had expired by its own terms on December 31, 1968 (Pet. App. 67-71). The permit was required under Section 10 of the Rivers and Harbors Act of 1899, 30 Stat. 1151, 33 U.S.C. 403. The application sought permission to dredge a portion of Biscayne Bay, Florida, in order to fill more than 50 acres of land bordering on the Bay and within the city of Coral Gables, Florida. Petitioner's plan envisioned a system of finger canals connecting with the Bay.

The Corps published public notice of petitioner's application on August 17, 1972 (A. 243-244),[1] and accepted comments until October 16, 1972. More than 500 letters of objection were received from nongovernmental individuals and groups (see, *e.g.*, App. Br. 49-66), as well as two letters from individuals in favor of the project.

The National Park Service objected that the project would disrupt sensitive biological communities in the nearby Biscayne National Monument (A. 97). The United States Department of the Interior's Fish and Wildlife Service stated that the project would "result in significant destruction and degradation of the marine resources of South Biscayne Bay" (A. 105, 107). The United States Environmental Protection Agency similarly objected to the project (A. 99).

The Florida Game and Fresh Water Fish Commission opposed the project, stating that it would "completely obliterate or degrade more than three hundred and fifty acres of biologically productive submerged land and tidal swamp, thus eliminating a significant portion of the Biscayne Bay ecosystem * * * " (A. 102, 104). The Florida Board of Conservation also opposed the project (App. Br. 44-48).

No state or federal agency commented favorably on the project.

The Corps gave petitioner an opportunity to present its views on the project's environmental effects and to answer the comments received in opposition to the project

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[1] "A." refers to the joint appendix before the court of appeals. "App. Br." refers to an appendix to appellees' brief before the court of appeals, in which certain documents from the administrative record were reproduced.

(A. 95-96). Petitioner thereupon submitted a report by Dr. Howard J. Teas concerning the effect of the project on the marine environment (A. 116-134) and a "Response to Agency Objections" by Dr. Teas (A. 109-116). In that response Dr. Teas admitted that "[t]he damage to marine organisms in the 55 acres that are to be filled is unquestioned * * * " (A. 111), but attempted to show that this land is of minimal ecological value (A. 111-114). Dr. Teas also attempted to show that the direct effect of the proposed dredging would be minimal (A. 115-116).

In his report, based on all the submissions received, respondent Lee, the Corps' District Engineer, summarized the comments received, concluded that there would be an "irreversible commitment of biologically productive areas" resulting in some ecological damage of an uncertain amount (Pet. App. 19, 23), noted the overwhelming opposition "by virtually all governmental agencies, citizens groups and even the Dade County Planning Department" (*id.* at 23), and requested authority "to deny the permit on the basis that the development would irretrievably commit biologically productive lands, lacks acceptability from both the public and private sector, and would not be in the public interest" (*ibid.*).

Lee's superiors concurred in his recommendation (App. Br. 89) and he was authorized to deny the permit (App. Br. 90). He then informed petitioner that its application was denied (Pet. App. 17-18). The reasons given included the project's destruction of "a biologically productive area in Biscayne Bay" and the objections of all governmental agencies commenting and more than 500 letters of opposition from the general public (*id.* at 18).

Petitioner filed this action in the United States District Court for the Southern District of Florida, which granted respondents' motion for summary judgment (Pet. App. 3-16). The court ruled that the Corps' decision should be set aside only if "arbitrary and capricious" (*id.* at 9-10), and, based on the entire administrative record, concluded that the decision should be upheld (*id.* at 11-14). The court also held that petitioner was not entitled to an administrative hearing under any statute or regulation and that, in any event, having had an opportunity to request a hearing, it elected not to do so, thereby waiving any claim to a hearing (*id.* at 7-9). The court of appeals summarily affirmed (*id.* at 1), and denied rehearing (*id.* at 2).

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any court of appeals, and presents no question warranting review by this Court.

1. Petitioner's claim that it was denied due process when the Corps denied its application for a permit without a full public hearing is insubstantial. Petitioner's expectation that its permit would be reinstated did not constitute a "vested property" right (Pet. 4) of which it could constitutionally be deprived only after a hearing. See, *e.g.*, *Board of Regents* v. *Roth*, 408 U.S. 564, 576-578.[2] In any event, the procedure followed here by the Corps, which gave petitioner the right to make written submissions in response to adverse comments on its

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[2]It is immaterial that petitioner obtained rulings in state court litigation, to which respondents were not parties, that it was entitled to certain permits under state law (Pet. App. 24-52). See, *e.g.*, *Di Vosta Rentals, Inc.* v. *Lee*, 488 F. 2d 674, 677 (C.A. 5), certiorari denied, 416 U.S. 984.

application, provided all the process that might have been constitutionally "due" in the circumstances. Cf. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895-896.[3]

. If petitioner thought it was entitled to a fuller opportunity to be heard, it could have so requested. Since it failed to do so either before or after its application had been denied, it ought not be heard now to complain. See *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37.[4]

The validity of the Corps' denial of petitioner's application without a hearing is not altered by any "cumulative effect" (Pet. 9) of the actions of the courts below in this case. The district court's obligation was to determine whether, on the basis of the administrative record before the court which had been the basis of the Corps' decision, the latter had acted arbitrarily in denying the application. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 414-417; *Camp* v. *Pitts*, 411 U.S. 138, 142-143. See also *Greenleaf Johnson Lumber Co.* v. *Garrison,* 237 U.S. 251, 268. Accordingly, that question

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[3]While not raising the issue in its questions presented, petitioner asserts (Pet. 10) that a hearing was required by 33 U.S.C. (Supp. II) 1344, which was enacted after petitioner had filed its application. That statute, however, merely provides that the Secretary of the Army "may issue [dredge and fill] permits, after notice and opportunity for public hearings * * *." This provision was evidently intended to assure that opponents of such an application would be given an opportunity to be heard before a permit was *granted,* but does not require a hearing if the permit is to be denied. See also 33 C.F.R. 209.120(g)(1), (2) (1972) (Pet. App. 55).

[4]In light of the already extensive opposition to its application, petitioner might have preferred that there be no public hearing at which still further opposition could be voiced.

was properly determined by summary judgment (Fed. R. Civ. P. 56(c)); cf. *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F. 2d 1275, 1286 (C.A. 9)), and there was no need to take the depositions of the officials responsible for the decision, particularly in view of the uncontroverted affidavits before the court to the effect that the Corps' decision had been based on matters in the administrative record (Pet. App. 7). Cf. Fed. R. Civ. P. 56(e). Finally, the court of appeals' use of summary procedures in affirming the district court was proper. See *Taylor* v. *McKeithen*, 407 U.S. 191, 194, n. 4; *Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 275-276.

2. There is no merit in petitioner's contention that the denial of its application was invalid because the Corps considered, in addition to adverse environmental effects, the widespread and virtually unanimous opposition of state and federal governmental agencies and the public, which opposition was itself based on such adverse effects. It would be odd indeed if the Corps, which is required by statute to solicit the views of interested governmental agencies,[5] were precluded from taking them into account.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

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[5]See, *e.g.*, 16 U.S.C. 662; 42 U.S.C. 4321.